IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL APPEAL NO.852 OF 2001

Vishal Vithal Shelke, Residing at C/o. Pratap B. Pokale, Plot No. 4, Opp. Devgiri Residency, Malhar Sena Chowk, Chatrapati Nagar, Garkheda, Aurangabad (Arrested by Mahim Police Station on 2nd July, 1999 and since then he is in custody and at present after conviction undergoing sentence at Yervada Central Prison, Pune - 6.	)	Appellant (Original accused)
Vs.		
State of Maharashtra (through Senior Police Inspector of Police Mahim Police Station in C.R. No. 309/99, FIR recorded on 30-6-1999 at the instance of Rajan Pandurang Joshi, under S. 302 I.P.C.	)	Respondent (Original Complainant)

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Mr.V.M.Thorat advocate with Mr.A.S.Gaikwad
Advocates for Appellant
Mrs.Usha Kejriwal, APP for the State-Respondent

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CORAM: N.V.DABHOLKAR AND
SMT.V.K.TAHILRAMANI,JJ.

DATE OF RESERVING
JUDGMENT: FEBRUARY 7, 2006
DATE OF PRONOUNCING
JUDGMENT:FEBRUARY 20, 2006

ORAL JUDGMENT: [PER SMT. V. K. TAHILRAMANI, J.]

1. Through this appeal, appellant i.e. original

accused has challenged the judgment and order dated 9-8-2001 passed by the Additional Sessions Judge, Bombay in Sessions Case No. 1376/99. By the said judgment and order, the learned Sessions Judge convicted the appellant under Section 302 of Indian Penal Code and sentenced him to imprisonment for life and fine of Rs.5,000, in default, imprisonment for two months.

2. The prosecution story briefly stated is as under-

. Deceased Kalpana Joshi, aged 22 years, was the daughter of Babaji Pandurang Joshi. At the relevant time she was working in Waghule Screen, Udyog No.1, Pitambar lane, Mahim Mumbai-16. P.W.1 Rajan Joshi was also working in said factory. The duty hours of the factory work were from 10.00 a.m., to 6.00 p.m. The accused was working as a painter and he was residing in a hut in Naigaon area in Mumbai, as a paying guest. Accused Vishal was in love with Kalpana and he desired to marry her. Time and again, he insisted that Kalpana should marry him, however, Kalpana refused to do so. One year prior to the date of incident, the accused had entered the house of Kalpana and

assaulted her and her mother. Complaint came to be lodged in respect of this incident. About eight days prior to the incident also Kalpana informed her father that accused is after her. On 30-6-1999 at about 9 a.m. Kalpana left her house to go to her office. At about 9.45 a.m. she reached near her office, at that time, one person suddenly attacked her with chopper. Kalpana fell on the road. Said person ran away from the spot holding the chopper. It is the prosecution case that the accused was the said person.

. P.W.8 P.S.I. Pandurang Salunke was attached to Mahim Police Station as SHO on 13-6-1999. He got message that one unknown person had cut the neck of a girl with chopper at Mahim. He informed this fact to P.W. 7 Dy.S.P. Vilas Sanghai. Thereafter P.W. 8 PSI Salunkhe and P.W. 7 Dy.S.P. Sanghai rushed to the spot, where they saw a girl lying in a pool of blood. Kalpana was put in the police van and taken to Bhabha Hospital where Kalpana was declared dead on arrival. P.W.1 Rajan Joshi was also taken to Bhabha Hospital in the said van. The complaint of Rajan Joshi (Exh.27) came to be recorded at Bhabha Hospital. The post mortem came to be conducted on the dead

body of Kalpana by P.W. 4- Dr. Tasgaonkar. Dr. Tasgaonkar noticed seven incised wounds and one abrasion on the body of Kalpana. The cause of death is given as haemorrhage and shock due to cut throat injury. After completion of investigation, the charge sheet came to be filed.

3. In due course the case was committed to the Court of Session. Charge came to be framed against the appellant, under Section 302 of Indian Penal Code. He pleaded not guilty to the said charge and claimed to be tried. The defence of the accused is that of total denial and false implication. After going through the evidence, adduced by the prosecution, the learned Sessions Judge convicted and sentenced the appellant, as stated in para no.1 above. Hence, this appeal.

4. We have heard Mr. V.A. Thorat, the learned advocate for the appellant and Mrs. Kejeriwal, learned APP for the respondent/State. We have perused the evidence, as well as judgment and order of the learned Sessions Judge. After giving our anxious consideration to the said matter, we are of the opinion that this appeal deserves to be allowed.

5. The learned Sessions Judge has based the conviction of appellant on two circumstances. The first circumstance is recovery of blood stained clothes and chopper at the instance of the appellant. The second circumstance is that the appellant had motive to murder Kalpana. It would not be inappropriate to mention here that there is no direct evidence on record to show that it was the appellant who had assaulted Kalpana. Thus, this case is based on the circumstantial evidence. The two circumstances have already been enumerated by us.

6. The first circumstance against accused is recovery of blood stained clothes and weapon i.e. chopper at the instance of the appellant, Mr. Thorat, the learned advocate for the appellant submitted that the said circumstance has been concocted by the prosecution and no reliance can be placed on the recovery of blood stained clothes and weapon. Mr. Thorat firstly submitted that memorandum panchanama (exh.12) relating to recovery of blood stained clothes and weapon is between 12.15 to 12.30 p.m. and the recovery panchanama (exh.12-A) is from 3.15 p.m. to 5.00

p.m. The first panchanama i.e. exh.12 is drawn at Mahim Police Station and thereafter accused alongwith police is stated to have left for the recovery of articles. Mr. Thorat has pointed out that at 2.00 p.m., the accused was in the Court of Metropolitan Magistrate at Bandra, where he had been produced for remand. The endorsement of the Magistrate on the remand application shows that accused was produced at 2.00 p.m. at the Court in Bandra for remand purposes. So also the Investigating Officer P.W.7 Dy.S. P. Sanghai has admitted that at 2.00 p.m., accused was produced at the Court in Bandra for the purposes of remand. Mr.Thorat has submitted that considering the distance from the Court at Bandra to Mahim Police Station, it would be absolutely impossible for the memorandum panchanama relating to the discovery of blood stained clothes and weapons, to start at 2.15 p.m. Mr. Thorat submitted that this clearly shows that the panchanama is a false and concocted panchanama and the recovery of blood stained clothes and weapon has been foisted on the accused. Looking to the distance between the Court at Bandra and Mahim Police Station, we find some merit in this submission.

7. In relation to the recovery of blood stained clothes and weapon, Mr. Thorat has further pointed out that though C.A. report shows blood stains of Group B on the shirt of the accused, panchanama relating to the shirt does not mention any blood stains. Mr. Thorat further submited that there is one further discrepancy, as far as discovery of clothes & weapon is concerned. As per the panchanama, the accused led them to hut No. 95 at Anna Bhau Sathe Nagar from where articles came to be discovered. However, the Investigating Officer P.W. 7 Dy.S.P. Vilas Sanghai has stated that accused led them to hut No. 99 at Annabhau Sathe Marg. Thus, Mr. Thorat submitted that there is discrepancy, as far as place from where the recovery took place. Mr. Thorat pointed out one further glaring discrepancy in relation to the clothes of the accused, which according to the prosecution came to be discovered at the instance of the accused. Mr. Thorat submitted that panch witness P.W. 3 Mohan Gawade has stated that shirt of the accused recovered at his instance was white in colour, whereas the panchanama mentions shirt to be green blue and red in colour.

8. Mr. Thorat further pointed out that the articles discovered at the instance of the accused were not sealed. He pointed out that the panchanama is totally silent on the aspect of sealing. So also panch witness i.e. P.W.3 Mohan Gawade does not state about sealing of any of the articles. Mr. Thorat submitted if articles are not sealed, the circumstance of discovery of these articles cannot be relied upon. In support of his contention, he has placed reliance on the decision of this Court in the case of **Tulshiram Kambale & Ors. Vs. The State of Maharashtra** reported in **1999 All MR (Cri) 1593**. Mr. Thorat has submitted that in the said decision, it has been observed that after effecting recoveries, if no seals are affixed, the evidence relating to discovery cannot be relied on. Mr.Thorat also placed reliance on the decision in the case of **State of Maharashtra, Vs. Prabhu Gade,** reported in **1995 CRI.L.J. 1432.** In the said decision, it has been observed in respect of recovery of blood stained clothes that where there is no evidence to show that the articles were kept in sealed condition till the time they were sent to Chemical Analyst, such evidence has to be excluded from consideration. Mr. Thorat submitted that in the present case,

the articles were lying in the police station for about twenty days before they were sent to Chemical Analyst. He has submitted that neither panch witness, nor the panchanama mentions sealing of any of the articles. Thus, he has submitted that there is no evidence to show that articles were sealed at any time and hence, the evidence relating to recovery of the articles should be excluded from consideration.

9. Thus, Mr. Thorat submitted that the cumulative effect of all the lacunae in respect of discovery of blood stained clothes and weapon would be that the discovery of these articles at the instance of the accused cannot be relied upon. We have noticed that in the present matter, there is no reliable material to show that the articles were sealed after they came to be seized and thus, we are of the opinion that the decisions in the case of **Tulshiram Kamble** and **Prabhu Gade** would be applicable to the present case. Looking to the evidence on record and looking to all these lacunae, in our considered opinion, the recovery of blood stained clothes and weapon at the instance of the accused, cannot be relied upon.

10. As observed above, due to various lacunae, we do not find it safe to rely on the circumstance of recovery of blood stained clothes and weapon at the instance of the appellant. This leaves us with only one circumstance against accused i.e. motive. In our opinion motive by itself is not enough to sustain the conviction.

11. In the result, appeal is allowed. The Judgment and Order dated 9-8-2001, delivered by the Additional Sessions Judge, Bombay in Session Case No. 1376/99, holding the appellant-Vishal Vithal Shelke guilty for the offence punishable under Section 302 of Indian Penal Code, is quashed and set aside. He is acquitted of the charge levelled against him. He be set at liberty forthwith, if not required in any other case.

. Registrar (Judicial) shall ensure early dispatch of appropriate writ.

(N. V. DABHOLKAR, J.)

(SMT. V. K. TAHILRAMANI, J.)